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# In the Supreme Court of the United States

OCTOBER TERM, 1980

ELVINA M. HERWEG, ET AL., PETITIONERS

*v.*

ROBERT D. RAY, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

WADE H. MCCREE, JR.
*Solicitor General*

ALICE DANIEL
*Assistant Attorney General*

GEORGE W. JONES
*Assistant to the Solicitor General*

*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

JOAN Z. BERNSTEIN
*General Counsel*

ROBERT P. JAYE
*Deputy Assistant General Counsel*

DAVID R. SMITH
*Attorney*
*Department of Health and Human Services*
*Washington, D.C. 20201*

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### QUESTION PRESENTED

Whether the district court correctly concluded, contrary to regulations of the Department of Health and Human Services, that Iowa may consider income as "available" to an applicant for benefits under the Medicaid Act in circumstances where that income would not be considered in determining eligibility for Supplemental Security Income benefits.

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This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

## STATEMENT

1. The Medicaid program was established in Title XIX of the Social Security Act, 42 U.S.C. 1396 *et seq.*, "for the purpose of providing federal financial assistance to States that choose to reimburse certain costs of medical treatment for needy persons." *Harris* v. *McRae*, No. 79-1268 (June 30, 1980), slip op. 1-2. As adopted in 1965, Title XIX only required participating states to provide medical assistance to individuals who received cash assistance under one of the four "categorically needy" assistance programs established in the Social Security Act.[1] See 42 U.S.C. (1970 ed.) 1396a(a)(10). Under Section 1902(a)(17) of the Act, 42 U.S.C. (1970 ed.) 1396a(a)(17), each participating state was required to adopt "reasonable standards * * * for determining eligibility for and the extent of medical assistance" and to take into account "only such income and resources as are * * * available to the applicant or recipient." Congress also required participating states to refrain from taking into account "the financial responsibility of any individual for any applicant or recipient of assistance * * * unless such applicant or recipient is such individual's spouse" or minor, blind, or disabled child. 42 U.S.C. (1970 ed.) 1396a(a)(17)(D).

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[1] Old Age Assistance, Title I, 42 U.S.C. (1970 ed.) 301 *et seq.*; Aid to Families with Dependent Children, Title IV, 42 U.S.C. (1970 ed.) 601 *et seq.*; Aid to the Blind, Title X, 42 U.S.C. (1970 ed.) 1201 *et seq.*; Aid to the Permanently and Totally Disabled, Title XIV, 42 U.S.C. (1970 ed.) 1351 *et seq.*

With the approval of the Secretary of Health, Education, and Welfare (now Health and Human Services), some participating states took the position that it was reasonable to expect an applicant's spouse to help pay the cost of the applicant's medical expenses and, therefore, adopted rules that took into account the spouse's income in determining Medicaid eligibility and the amount of assistance. These states calculated an amount considered necessary to pay the basic living expenses of the applicant's spouse and "deemed" any income of the spouse in excess of that amount "available" to the applicant.

In 1972, Congress replaced three of the four categorical assistance programs with a new federal program, Supplemental Security Income for the Aged, Blind, and Disabled (SSI), 42 U.S.C. 1381 *et seq.*[2] As noted, from the inception of the Medicaid program in 1965, participating states were only required to provide medical assistance to those individuals receiving cash assistance under one of the categorical assistance programs. Participating states were also entitled to receive federal financial assistance under the Medicaid program if they chose to provide medical assistance to the "medically needy," *i.e.*, certain individuals who satisfied specified income requirements after incurred medical expenses were deducted from their income. See 42 U.S.C. (1970 ed.) 1396a (a)(10)(B). Adoption of the SSI program was not intended to affect the traditional linkage between

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[2] As its name indicates, the SSI program replaced the categorical assistance plans for the aged, blind, and disabled. The provisions of the old categorical assistance programs remain effective in Puerto Rico, Guam, and the Virgin Islands. See Pub. L. No. 92-603, Title III, Sections 303(a) and (b), 86 Stat. 1484.

categorical assistance eligibility and Medicaid eligibility. See 42 U.S.C. 1396a(a)(10)(A), (C), and 1396d(a); see also 42 U.S.C. 1383c.

Under the SSI program, however, the states would no longer control the standards of need for the aged, blind, and disabled. In some states, the group of individuals that would be eligible for SSI assistance, and consequently eligible for Medicaid assistance, was significantly larger than the group of individuals that was eligible under the old assistance programs for the aged, blind, and disabled. Participating states would, therefore, have been forced to: (1) expand their Medicaid assistance obligations involuntarily, (2) withdraw from the Medicaid program, or (3) reduce the level of benefits provided under their Medicaid plans. To avoid these consequences, Congress offered the states what has come to be called the "209(b) option," which allows each state either to accept the expanded Medicaid obligations resulting from adoption of the SSI program or to limit Medicaid eligibility to the group of individuals who would have been eligible for assistance under the state Medicaid plan on January 1, 1972. 42 U.S.C. 1396a(f).[3]

The income of an applicant's spouse is attributed to the applicant for the purpose of determining eligibility and the amount of assistance under the SSI program. When the applicant and his spouse share a single home, the income of both is considered in detemining the eligibility of either. 42 U.S.C. 1382a(a), 1382c(b), (f)(1). If the applicant and his spouse cease to share the same household, the income of the applicant's spouse is considered only if the spouse

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[3] The provision was enacted as Section 209(b) of the Social Security Amendments of 1972, Pub. L. No. 92-603, 86 Stat. 1381.

is an "eligible spouse." 42 U.S.C. 1382c(b).[4] By definition, an applicant's spouse cannot remain an "eligible spouse" for more than six months after the separation. *Ibid.*

Any state that participates in the Medicaid program but fails to exercise the 209(b) option (an "SSI state") is specifically required to provide medical assistance to all SSI benefit recipients. 42 U.S.C. 1396a(a)(10)(A). The Secretary's regulations make explicit what is implicit in the relationship of the Medicaid and SSI statutes, by requiring all SSI states to consider the income of an applicant's spouse in making Medicaid determinations only to the extent that the income would be considered under the SSI statute. 42 C.F.R. 435.723, 435.700. Based on the relationship between the Medicaid and SSI statutes, but taking into account Congress' purpose in adopting the 209(b) option, the Secretary also issued parallel regulations applicable in 209(b) jurisdictions. 42 C.F.R. 435.734.

2. Petitioners filed this class action in the United States District Court for the Southern District of Iowa, challenging the provisions of the Iowa Medicaid Plan that permit consideration of the income of an applicant's spouse. Iowa is an SSI state, but under its Medicaid program in effect at the time of suit a "formula" was used for determining the portion of the income of an applicant's spouse that was "available" to the applicant, apparently without regard to the length of time the applicant and his spouse had been separated (see Pet. App. 76a-77a, 86a). Petitioners argued that the Iowa practice was inconsistent

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[4] For administrative reasons, if the applicant and his ineligible spouse separate in the middle of a particular month, the income of the spouse is considered until the end of that month.

with both the requirements of Section 1902(a)(17) of the Act, 42 U.S.C. 1396a(a)(17), and applicable HHS regulations, 42 C.F.R. 435.723 (Pet. App. 79a).[5] Petitioners also argued that the Iowa procedures violated (i) the Equal Protection Clause of the Fourteenth Amendment because they irrationally discriminated against married institutionalized Medicaid applicants and (ii) the Due Process Clause of the Fourteenth Amendment because they created an "irrebutable presumption" that the spouse is able to pay the amount computed by the formula and that the money is "actually available" to the applicant (Pet. App. 80a).[6]

Relying on Section 1902(a)(17), the district court held that Iowa could consider the income of an applicant's spouse in making Medicaid determinations, but only after making individualized factual inquiries to determine the amount of the spouse's income that should be attributed to the applicant. The court did not find that the amount of the income attributed to the named plaintiff was unreasonable or unduly burdensome: "the operation of the [Iowa] formula as finally computed appears to make a reasonable allocation of income in the situation before the Court"; but the court attributed that fact to "mere[] coinciden[ce]" (Pet. App. 85a). According to the district court, Section 1902(a)(17) requires individual factual determinations in every case of what income is "available" (Pet. App. 85a). In addition, the district

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[5] At the time the complaint was filed, the applicable HHS regulation was codified at 45 C.F.R. 248.3(b) (1976).

[6] The district court's reference to the Due Process Clause of the Fifth Amendment (Pet. App. 80a) is erroneous. In any event, the district court did not reach the constitutional claims (Pet. App. 87a), apparently taking the position that its statutory holding eliminated the basis for the constitutional claims.

court concluded that the Iowa procedure was inconsistent with the HHS regulations (*id.* at 86a), but that the regulations themselves were inconsistent with the statute (*id.* at 87a). Because HHS was not a party to the litigation, the district court thought it inappropriate to hold the regulations invalid (*ibid.*).

In response to the district court's decision, Iowa adopted a procedure for making individual factual determinations of the amount of income of an applicant's spouse that is "available" for Medicaid purposes. Petitioners objected and sought clarification of the district court's order, taking the position that none of the income of an applicant's spouse could be attributed to the applicant unless it was actually contributed (see Pet. App. 90a-91a). Applicable HHS regulations require this result after the applicant and his spouse have been separated for one month if the applicant's spouse is not an "eligible spouse," as defined in 42 U.S.C. 1382c(b).[7] Nevertheless, the district court ignored the HHS regulations and "specifically approved" (Pet. App. 94a) the procedure adopted by Iowa. Although the court acknowledged that the position urged by petitioners "might be possible under the relevant statutes," it concluded that "[t]he existence of alternative procedures is irrelevant" (*id.* at 92a). The court also held that, in making Medicaid determinations, Iowa must disregard the receipt of Social Security benefits, Railroad Retirement Board annuities, and Civil Service Commission annuities (*id.* at 90a, 92a).

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[7] As noted above, no one can remain an "eligible spouse" for more than six months. Therefore, after an applicant and his spouse have been separated for more than six months, HHS regulations require the result contended for by petitioners in the district court.

The court of appeals affirmed in part and reversed in part (Pet. App. 1a-75a). Sitting en banc, the Eighth Circuit affirmed by an equally divided court that part of the district court decision requiring Iowa to make individual factual determinations of available income for Medicaid purposes without regard to the time limitations imposed by the HHS regulations (*id.* at 2a). The court of appeals unanimously reversed the district court's holding that Iowa must disregard Social Security benefits, Railroad Retirement Board annuities, and Civil Service annuities in making Medicaid computations (*id.* at 2a, 28a, 74a).

## DISCUSSION

1. The decision of the court of appeals in this case is one of four recent circuit court decisions concerning deeming practices under the Medicaid Act. See *Gray Panthers* v. *Administrator, Health Care Financing Administration*, 629 F.2d 180 (D.C. Cir. 1980), petition for cert. pending, No. 80-756 (filed Nov. 10, 1980); *Brown* v. *Stanton*, 617 F.2d 1224 (7th Cir. 1980), petition for cert. pending, No. 79-1690; *Norman* v. *St. Clair*, 610 F.2d 1228 (5th Cir. 1980), petition for cert. pending, No. 80-498 (filed Sept. 27, 1980).[8] Each of these decisions is to some

[8] See also *Allen* v. *Califano*, Civ. No. 78-0212 (D. Utah Aug. 23, 1979), appeal pending, No. 79-2167 (10th Cir.) (ordering the Secretary to rescind 42 C.F.R. 435.734 and to issue regulations that require 209(b) states, Guam, Puerto Rico, and the Virgin Islands "to cease assuming the availability of any income that is not in fact available for any length of time" (Order at 2). Appellate proceedings in *Allen* have been stayed pending consideration of the Secretary's petition for a writ of certiorari in *Harris* v. *Gray Panthers*, No. 80-756, but the Tenth Circuit refused to stay the district court's

extent irreconcilable with the others. Although the Eighth Circuit's decision in this case is the first to consider deeming in an SSI state, it, like the other decisions, is based, at least in part, on an interpretation of the term "available" income, as used in the Medicaid statute, and constitutes a rejection of the Secretary's analysis of the relationship between the Medicaid and SSI statutes.[9]

Like the cases involving deeming in 209(b) jurisdictions, this case has significant implications for every state in the nation except Arizona, which has no Medicaid program. Participating states are free to elect or forego the Section 209(b) option at their discretion. Misssissippi, formerly a 209(b) jurisdiction, has decided to become an SSI state effective July 1981. See Miss. Ann. Code § 43-13-115 (1972), as amended in Mississippi Senate Bill No. 2118 (May 21, 1980). New York, formerly an SSI state, has recently decided to exercise the 209(b) option. Other states are free to follow. Medicaid is a nationwide program, under which billions of dollars are paid on behalf of millions of individuals each year.[10] It is the

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order pending appeal. The government has filed a petition for reconsideration of the order denying the motion to stay the *Allen* order pending appeal.

[9] We therefore disagree with petitioners' suggestion (Pet. 17; see id. at 18) that this case is significantly different from those cases involving deeming in 209(b) jurisdictions. With respect to both SSI and 209(b) jurisdictions, the pertinent HHS regulations were based upon the Secretary's analysis of the relevant statutes and were issued pursuant to her authority to prescribe the standards for determining "available" income under the Medicaid statute, 42 U.S.C. 1396a(a)(17)(B).

[10] See petition for a writ of certiorari in *Harris* v. *Gray Panthers*, No. 80-756, at 10-11.

Secretary's responsibility to require participating states to provide medical assistance to each qualified applicant with a minimum of administrative delay and cost and to assure that participating states do not receive federal financial assistance for providing medical assistance to any applicant who is not among the intended beneficiaries of the Medicaid program. Because of the conflicting decisions of the courts of appeals, the Secretary now must follow different rules in different SSI and 209(b) states concerning whether "deeming" is permissible at all and, if it is, in what manner and for how long may it be used.

The Eighth Circuit is the only court of appeals to have considered deeming in a case involving an SSI state. Nevertheless, both the Fifth Circuit and the D.C. Circuit have accepted the Secretary's view that the relationship between the Medicaid and SSI statutes requires SSI states to consider the income of an applicant's spouse as available to the applicant only to the extent that it would be considered in determining SSI eligibility. See *Norman* v. *St. Clair*, *supra*, 610 F.2d at 1238; *Gray Panthers* v. *Administrator*, *supra*, 629 F.2d at 183. Thus, although there is no direct conflict among the courts of appeals on this point, the Secretary currently is faced with three inconsistent decisions concerning the proper relationship between the Medicaid and SSI programs in regard to the determination of "available" income.[11]

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[11] Pursuant to the decision in *Gray Panthers* v. *Administrator*, the Secretary recently issued regulations that prohibit 209(b) jurisdictions from considering the income of an applicant's spouse as "available" to the applicant unless it would be considered in determining SSI eligibility. 45 Fed. Reg. 82254 (1980). The effect of the decisions in this case and *Gray Panthers*, therefore, is to permit Iowa, an SSI state, to consider the income of an applicant's spouse even though

This Term the Court will have the opportunity to resolve the conflict in the circuits as to whether deeming is permissible under the Medicaid Act. See *Brown* v. *Stanton*, *supra*. If deeming is permissible, it is important that the appropriate procedure for deeming and the permissible limitations on the practice be settled as expeditiously as possible. This case squarely raises the third issue, and incidentally presents the first and second issues as well.

2. The district court's decision is plainly contrary to valid HHS regulations. In an SSI state, after the first month in which the applicant and his ineligible spouse have been separated, only income that is "actually contributed" to the applicant by his spouse may be considered "available" under the regulations. 42 C.F.R. 435.700, 435.723. Yet, the district court's order directs Iowa to consider the income of an applicant's spouse as "available" indefinitely, so long as the determination of available income is made after an individual hearing. As Judge Ross observed (Pet. App. 10a-11a), "there is no dispute that the new procedure approved by the district court is contrary to regulation [42 C.F.R.] 435.723." Respondents do not deny that their current procedure is contrary to the HHS regulations; rather, they ignore the regulations and argue that the district court's interpretation of the statute is correct (see Br. in Opp. 15-16).

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that income would not be considered in determining SSI eligibility, but to prohibit 209(b) states from doing so. This turns the statutory scheme created by Congress on its head and frustrates Congress' purpose in enacting the 209(b) option.

Under Section 1902(a)(17)(B) of the Act, however, the Secretary is explicitly authorized to prescribe standards for determining what income is "available" to a Medicaid applicant. 42 U.S.C. 1396a (a)(17)(B). Therefore, unless those regulations are arbitrary, capricious, or otherwise unlawful, they must be given legislative effect. See *Batterton* v. *Francis*, 432 U.S. 416, 425-426 (1977).

The HHS regulations that govern in this case are based on the Secretary's sound analysis of the interrelationship of two complex social welfare statutes. States that participate in the Medicaid program but fail to exercise the 209(b) option (see 42 U.S.C. 1396a(f)) must provide medical assistance to all individuals who are SSI recipients. 42 U.S.C. 1396a (a)(10)(A); 42 C.F.R. 435.120. It follows, therefore, that as to this group an SSI state cannot be allowed to consider the income of a Medicaid applicant's spouse as "available" to the applicant if the income would not be considered in determining eligibility or the amount of assistance under the SSI statute. See 42 C.F.R. 435.700. With carefully limited exceptions,[12] no SSI state is entitled to federal financial assistance for providing medical assistance to aged, blind, or disabled individuals who do not meet SSI income limitations.

To the extent relevant here, SSI states may receive federal financial assistance for providing medical assistance to: (1) individuals who would be eligible for SSI benefits or an optional state supplement, if

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[12] See, *e.g.*, 42 C.F.R. 435.122, 435.130, 435.131, 435.132, 435.133, 435.134, 435.135, 435.210, 435.211, 435.230, 435.231, 435.301. Iowa does not have a "medically needy" program, and therefore it is unnecessary in this case to consider the regulations applicable to the "medically needy."

they applied, 42 C.F.R. 435.210;[13] (2) individuals who would be eligible for SSI or an optional state supplement if they were not institutionalized and therefore subject to lower income standards, 42 C.F.R. 435.211; and (3) if the state chooses to provide Medicaid coverage to the group that would be eligible for SSI or state supplemental payments but for institutionalization, then the state may also provide Medicaid assistance to the group of institutionalized individuals who would be ineligible for benefits under either the SSI program or the state supplement program even if they were not institutionalized, 42 C.F.R. 435.231.[14] Each of these groups is defined in part by reference to SSI income limitations. It follows, therefore, that the same method of calculating income under the SSI statute must be

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[13] Under Section 1616 of the Act, a state may make cash payments to certain individuals "as assistance based on need in supplementation of [SSI] benefits (as determined by the Secretary [of HHS])." 42 U.S.C. 1382e(a). Although the state may set higher income limitations than those applicable under the SSI statute, the state is only entitled to federal financial assistance for providing Medicaid coverage to these individuals if their gross income is no more than 300% of the SSI benefit amount (*i.e.*, 300% of the SSI income eligibility standard). See 42 U.S.C. 1396b(f)(4)(C); 42 C.F.R. 435.230, 435.1006. Furthermore, the state may only provide medical assistance to supplemental payment recipients who are receiving SSI benefits "or who would but for [excessive] income be eligible to receive such benefits." 42 U.S.C. 1396d(j).

[14] But, as observed above concerning Medicaid coverage of state supplement recipients generally (note 13, *supra*), a participating state is entitled to federal financial assistance for providing medical assistance to a member of this group only if his gross income is not in excess of 300% of the SSI benefit amount. See 42 C.F.R. 435.231(2), 435.1005.

used in calculating income for purposes of determining whether a state is entitled to receive federal financial assistance for providing medical assistance to an individual pursuant to one of these options.[16] Thus, the HHS regulations requiring SSI states to consider income of an applicant's spouse as "available" to the applicant, in determining Medicaid eligibility under one of these three options, to the same extent that it would be considered in determining SSI eligibility (42 C.F.R. 435.723) are not only reasonable, they are "compelled by the relationship between the SSI and the Medicaid programs" (Pet. App. 61a-62a; McMillian, J., dissenting).

There is nothing in the plain language of Section 1902(a)(17) of the Act that requires a contrary result or that can support the holding of the district court. The statute does not speak to the question of

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[16] For example, if a state decides to provide Medicaid coverage to individuals who would be eligible for state supplemental payments if they filed applications, it is entitled to federal financial assistance for providing medical assistance to an individual in this group only if his gross income does not exceed 300% of the SSI benefit amount. See 42 C.F.R. 435.210, 435.230, 435.1006. If the state may ignore income that would be considered in determining SSI eligibility, then the 300% limitation is rendered meaningless and the state may receive federal financial assistance for providing medical assistance to individuals whose income is greatly in excess of that limitation. On the other hand, if the state includes income that would be ignored under the SSI program, individuals who should be covered under this category will be improperly denied assistance. For example, an individual who would be eligible for SSI benefits if he applied is necessarily eligible for state supplemental payments. Yet, if the state, in determining Medicaid eligibility, may include income that is ignored for purposes of SSI, this individual may be denied medical assistance.

what income is "available." Rather, Congress specifically authorized the Secretary to define the term "available" income for the purpose of determining Medicaid eligibility. Section 1902(a)(17) cannot reasonably be read to permit participating states to ignore the standards for determining available income that it specifically authorizes the Secretary to prescribe. Congress obviously did not regard the meaning of the term "available income" as self-evident. The district court offered no reason for rejecting the Secretary's regulations, other than its disagreement with the Secretary's interpretation of the term "available." But Congress has left the interpretation of that term to the Secretary and not the courts. "A reviewing court is not free to set aside those regulations simply because it would have interpreted the statute in a different manner." [16] *Batterton* v. *Francis*, *supra*, 432 U.S. at 425.

3. The decision in this case seriously misapprehends the relationship between the Medicaid and SSI statutes. Having failed to exercise the 209(b) option, Iowa is statutorily required to provide Medicaid coverage to all SSI recipients. 42 U.S.C. 1396a(a)(10)(A); 42 C.F.R. 435.120. The income of an applicant's ineligible spouse is not considered for pur-

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[16] For the same reason, the district court erred in requiring Iowa to conduct individualized factual inquiries to determine what income is "available" to the applicant. The Secretary's regulations do not require individualized hearings and there is nothing in the term "available" income that suggests that the only permissible way of making the determination is by conducting such hearings. Compare, *e.g.*, *Califano* v. *Jobst*, 434 U.S. 47, 53 (1977). A similar issue is raised in the Secretary's petition for a writ of certiorari in *Harris* v. *Norman*, No. 80-498, at 9-14.

poses of determining SSI eligibility after an applicant has been institutionalized for one month. See 42 U.S.C. 1382(a)(1), 1382c(b), (f)(1); 42 C.F.R. 435.723(d). Hence, as the Secretary's regulations provide, such income may not be considered beyond the one-month period in determining eligibility for or the amount of Medicaid benefits.

If, as in the named petitioner's case, the applicant has no income of his own and is in a private institution, he is eligible for SSI benefits. If such an applicant applies and receives SSI benefits, then in an SSI state he would also be entitled to Medicaid benefits. Yet, under the district court's order, Iowa may deny Medicaid benefits to such an applicant if, after making an individual factual determination, Iowa concludes that the income of the spouse should be considered available in an amount greater than the SSI limitations.[17]

Although Mrs. Herweg was not an SSI recipient, the district court certified a class comprising (Pet. App. 87a):

> all married couples residing in Iowa of which: (1) one spouse is eligible for Medicaid and requires institutionalization; and (2) the other spouse is not institutionalized; and (3) the non-institutionalized spouse has income which is, under current state procedures, being deemed available to the institutionalized spouse.

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[17] Mrs. Herweg was not an SSI recipient, but the same analysis is appropriate with respect to an individual who would be eligible if he applied (42 C.F.R. 435.210, 435.723) or would be eligible but for his institutionalization (42 C.F.R. 435.211, 435.723), assuming, of course, that the state chooses to cover these groups, as Iowa has (see 3 Medicare and Medicaid Guide (CCH) ¶ 15,586 at 6543 (July 23, 1980)).

That class is on its face not limited to non-SSI recipients. Furthermore, the new Iowa deeming procedure, which was specifically approved by the district court, is by its terms applicable "to all applicants/recipients in a Title XIX Medical Institution who: 1. Have a non-institutionalized spouse * * * and 2. The non-institutionalized spouse * * * [is] ineligible for SSI * * *."[18] Thus, the district court's decision seems to require Iowa to adopt procedures that violate both the Secretary's regulations and the explicit command of Section 1902(a)(10)(A) of the Act, 42 U.S.C. 1396a(a)(10)(A). This decision warrants further review.

[18] State of Iowa, Department of Social Services, Des Moines, Social Services Manual Letter No. 37, at 1-2. See also *id.* at 8 (contemplating application of the new procedure to SSI recipients).

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

WADE H. MCCREE, JR.
*Solicitor General*

ALICE DANIEL
*Assistant Attorney General*

GEORGE W. JONES
*Assistant to the Solicitor General*

JOAN Z. BERNSTEIN
*General Counsel*

ROBERT P. JAYE
*Deputy Assistant General Counsel*

DAVID R. SMITH
*Attorney*
*Department of Health and Human Services*

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